RESPONSE NOT PRINTED

APR 13 1967

JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

October Term, 1966

No. 1266

STATE OF OREGON,
Petitioner,

v.

FRANK LEROY BREWTON,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of Oregon

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In the Supreme Court of the United States

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No. ——

STATE OF OREGON,
Petitioner,

v.

FRANK LEROY BREWTON,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of Oregon

The state of Oregon prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Oregon entered in the above case on January 18, 1967.

OPINIONS BELOW

The majority and dissenting opinions of the Supreme Court of the State of Oregon, printed in Appendix A hereto, are reported at 84 Or Adv Sh 13 —— Or ——, —— P2d —— (1967).

JURISDICTION

The Supreme Court of Oregon entered judgment in this case on January 18, 1967, and there was no petition for rehearing. The decision is expressly founded upon the provisions of the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States. Petitioner invokes the jurisdiction of

this Court under 28 U.S.C., § 1257 (3), since a right has been especially set up and claimed under the Constitution of the United States.

QUESTION PRESENTED

Do the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution bar the use for the limited purpose of impeachment of non-inculpatory portions of defendant's voluntary statement obtained in 1957 without denial of or advice regarding counsel?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

On December 20, 1957, defendant was indicted by the Grand Jury of Multnomah County, Oregon, for the crime of first degree murder. He was tried by a jury, found guilty of first degree murder and on April 10, 1958, sentenced to the Oregon State Penitentiary for the remainder of his life, as recommended by the jury.

Defendant appealed the conviction as an indigent. He was provided with free transcript, but his request for counsel was denied inasmuch as the Supreme Court of Oregon, having reviewed the entire record, found there to be no error and affirmed. The opinion is re-

ported as *State v. Brewton*, 220 Or 266, 344 P2d 744 (1959).

In 1963, defendant filed a petition for a writ of habeas corpus in the United States District Court for the District of Oregon, alleging, among other grounds, deprivation of appellate counsel. The writ was denied. Defendant appealed to the United States Court of Appeals for the Ninth Circuit, which on June 3, 1963, reversed on the basis of *Douglas v. California*, 372 US 353 (1963), decided during the appellate interim. In accordance with the order of the District Court, the Supreme Court of Oregon remanded the case for appointment of counsel and appeal de novo, which was done.

The Supreme Court of Oregon on October 21, 1964, disposed of the second appeal by opinion reported as *State v. Brewton*, 238 Or 590, 395 P2d 874 (1964). The conviction was reversed and remanded for an independent hearing as to voluntariness of confessions as required by *Jackson v. Denno*, 378 US 368 (1964), decided subsequent to the *Brewton* argument.

On remand, the trial court held a hearing and found that the defendant's statements were voluntary, but inadmissible inasmuch as they were obtained without having first advised defendant of his rights to silence and counsel. The findings and order appear herein as

Appendix B. See *Escobedo v. Illinois*, 378 US 478 (1964), decided in the interim. A new trial was ordered on the basis of *Escobedo* and *State v. Neely*, 239 Or 487, 395 P2d 557, 398 P2d 482 (1965), also decided in the interim.

The second trial by jury also resulted in a verdict of guilty of first degree murder and on May 19, 1965, defendant was sentenced to life imprisonment again. The conviction was appealed.

On January 18, 1967, the Supreme Court of Oregon disposed of Brewton's third appeal by reversing and remanding for a new trial, citing, among other cases, *Miranda v. Arizona*, 384 US 436 (1966), decided in the interim. The opinion is printed at Appendix A. The judgment is final for these purposes per *Miranda v. Arizona*, at 498.

Then followed this petition for writ of certiorari on behalf of the state.

STATEMENT OF FACTS

On November 14, 1957, the defendant and his friend, one Eugene Taylor, entered a neighborhood grocery store in Portland, Oregon (Tr. 528). Gunplay occurred during the commission of a robbery by defendant and Taylor (Tr. 185 and 467), from which the store owner died a few hours later (Tr. 173-174) and Taylor died a few months later (Tr. 653).

On two occasions defendant made certain voluntary statements to police officers while in custody. On November 15, 1957, he gave a statement, but was not advised of his rights to silence or counsel. On November 17, 1957, he was advised of his right to remain silent, but not of his right to counsel, and made further statements. There was no coercion or duress or actual denial of counsel. (See FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER, set out in Appendix B.) These statements were not used during the state's case in chief.

Certain very limited portions of each statement were used for impeachment purposes as to matter brought out in defendant's direct examination as prior inconsistent statements. The "confession" portion was never used. The court gave an appropriate cautionary instruction prior to the reception of the evidence (Tr. 708) and more extensively as a part of his charge (Tr. 866-869).

The portions of defendant's statements used for the purpose of impeachment generally consisted of non-inculpatory matter. There were five items in all which we set out together with defendant's testimony giving rise to the opportunity to impeach:

1. PLAN TO ROB. Defendant testified as to his various activities on the evening of the robbery. He said

that he and Taylor happened to leave off a passenger near the victimized grocery store, at which time they entered together so that Taylor could collect from the victim $20 which was related somehow to the sale of a gun (Tr. 524-528). He specifically denied any agreement or *discussion* with Taylor regarding a robbery (Tr. 536-537).

In rebuttal, detectives testified to the prior inconsistent statement that defendant and Taylor had discussed and planned a robbery while driving around the Sellwood area of Portland that evening (Tr. 725-726).

2. LOCATION OF CAR DURING ROBBERY. Defendant testified that the car in which he rode was parked at the corner and across the street from the grocery store (Tr. 532).

In rebuttal, detectives testified that defendant told them that the car was parked four blocks away (Tr. 725-726, 719-720).

3. DEFENDANT'S LOCATION IN STORE WHEN SHOT. Defendant admitted on direct being in the store during the shooting. He testified that he was walking toward the door when he was shot in the hand, then he ducked behind a counter (Tr. 530-531).

In rebuttal detectives testified that defendant told them he was headed for the door, but was at the counter when shot (Tr. 720, 726).

4. TIME SPENT WITH TAYLOR. Defendant testified generally that he was with Taylor all evening.

In rebuttal detectives testified that defendant had told them that he had last seen Taylor around 5-5:30 p.m. the evening of the robbery (Tr. 731, 736).

5. GLOVES. Defendant specially reopened direct examination to testify that he wore no gloves when he entered the store with Taylor (Tr. 543).

In rebuttal, detectives testified that defendant had told them that he wore pigskin gloves when he entered the store (Tr. 742, 743-744).

HOW THE FEDERAL QUESTION AROSE

This case is among the progeny of *Escobedo v. Illinois*, 378 US 478 (1964), as is compelled the decision of the Supreme Court of Oregon in *State v. Neely*, 239 Or 487, 395 P2d 557, 398 P2d 482 (1965), which requires custodial advice under the Fifth, Sixth, and Fourteenth Amendments similar to that required now by *Miranda v. Arizona*, 384 US 436 (1966).

The Supreme Court of Oregon decided squarely in this case that the exclusionary rule of the Fifth, Sixth, and Fourteenth Amendments, as interpreted in *Escobedo* and *Miranda*, prevents the use of impeachment of voluntarily given but "illegally" obtained statements of the defendant.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

1. This Case Is of Extraordinary Importance to the Parties.

Of course any case is of extraordinary importance to a defendant sentenced to life for murder. Proper disposition is also of more than usual importance to the state. The original verdict of conviction rendered under the rules and principles applicable in 1957 was fair and just. Thereafter, defendant was the indirect beneficiary of retroactive application of an incredibly fortuitously timed series of federal constitutional cases (see Statement of the Case) in the intervening nine years of litigation, including two guilty verdicts, three state appeals, and one federal habeas corpus appeal. Witnesses have died and become otherwise unavailable. The likelihood that justice will be achieved by a retrial is diminished by the passage of time. Thus, the proper disposition of this case is of major significance to the State of Oregon.

2. The Issue Needs Clarification.

(a) The Jurisdictions Are in Conflict.

The problem of the permissibility of use of voluntary but unconstitutionally obtained statements places in direct conflict two otherwise uncompromisable policies: first, the prophylactic exclusionary rule designed to curb potential police misconduct; second, the desire for non-

perjurious testimony and aid of the judicial truth seeking process. The various jurisdictions faced with the balancing process in this situation have come up with three basic positions.

By its decision in this case Oregon has given absolute weight to the first interest to the exclusion of the second (although no police misconduct appears here). Before this case, involuntarily given statements were excluded for impeachment purposes because they were no more trustworthy and reliable for impeachment purposes than they are for the state's case in chief. *State v. Goodwin*, 207 Or 642, 298 P2d 1024 (1956); *State v. Smith*, ___ Or ___, 408 P2d 942 (1965). This case extends the impeachment exclusion to any unconstitutionally obtained statement regardless of trustworthiness, reliability or traditional voluntariness.

The very opposite conclusion was reached recently by the State of Washington, and this Court denied certiorari therein. *State v. McClung*, 66 Wash 2d 654, 404 P2d 460 (1965), cert den 384 US 1013. The Washington court reasoned from *Walder v. United States*, 347 US 62 (1954), that prophylaxis is sufficiently served by the prohibition against the state's use of the statement in its case in chief where the defendant gives contrary testimony on direct examination. The Washington position is consistent with the opinions of the three dissenting Oregon justices in this case.

Looking to *Walder v. United States*, and particularly the paragraph below, the federal courts have forged a middle ground:

> "It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which the evidence and the Government's possession was obtained to his own advantage and provide himself with a shield against contradiction from his own untruths. Such an extension of the *Weeks* doctrine would be a perversion of the Fourth Amendment." At page 65.

Tate v. United States, 283 F2d 377 (CADC 1960), is the first and leading case applying the *Walder* doctrine to confessions. Judge Burger therein stated the two conflicting principles. He noted that the impeaching statement in *Tate* was no more inculpatory per se than the testimony of the defendant at trial. Thus, its significance lay not in its reflection on guilt or innocence, but rather solely in its reflection on defendant's credibility as a witness. Therefore, in *Tate*, non-inculpatory portions of defendant's statements were allowed to impeach those portions of defendant's testimony which went beyond denial of the elements of a crime for which he was charged. Judge Burger wrote, at pages 381-382:

> "We hold simply that when a defendant elects to take the stand, compelling considerations of justice require that we do all in our power to make certain

he tells the truth and, as most oaths require, 'the whole truth.'"

* * * * *

"The accused is still free to take the stand and truthfully deny all elements of the crime. Once he goes beyond denial of the crime itself and testifies as to collateral matters he is under an *added* compulsion to tell the truth. * * * What is proscribed by Walder is the freedom 'to resort to perjurious testimony.' Neither sound public policy nor the ends of justice in the particular case would be served by a different rule. Whatever inhibition arises out of our view of the law it is not against testifying, but against testifying falsely." (Original emphasis.)

The *Tate* rule has been followed consistently in the District of Columbia. See *Long v. United States*, 338 F2d 543, 548 (CADC 1964); *Johnson v. United States*, 344 F2d 163 (CADC 1964); *United States v. White*, 225 F Supp 514 (DC 1963), revd 349 F2d 965 (CADC 1965).

The Second Circuit has applied the *Tate* doctrine to statements inadmissible under the *McNab-Mallory* rule, stating:

"* * * But it does not follow that, if such evidence is excluded for one purpose, it must be excluded for all purposes. It is enough to deter illegal police activity if the government is prohibited from using evidence obtained by such activity to prove its direct case. In view of this adequate penalty, to deny to the government the use of [defendant] Curry's statement to impeach his contrary testimony at trial would be an unnecessary impediment to the search for truth." *United States v. Curry*, 358 F2d 904 (CA 2, 1966).

The First Circuit has also indicated its readiness to apply such a rule. See *Kerrigan v. Scafati*, 348 F2d 187, 189 (CA 1, 1965).

Thus the state of the law on the subject is presently in chaos. Faced with the desirability of obtaining absolute prophylaxis at the price of uncontradicted perjury, Washington and Oregon (by a severely divided court) have achieved exactly opposite results. The federal courts have developed a compromise formulation which seeks to serve both interests, but analysis of the District of Columbia cases shows that the application of that formulation to varying fact situations has been uneven in the extreme. At this time, justice is non-uniform from jurisdiction to jurisdiction and within one of them, the District of Columbia, the result seems to depend upon which three judges are seated to review the case. This sort of non-uniformity pleads for resolution, particularly in view of the denial of certiorari in *State v. McClung*, *supra*.

(b) Appeals and Collateral Attack on Pre-*Miranda* Trials.

Despite the non-retroactive dictum in *Miranda v. Arizona* (see quote *ante*), this problem will haunt the courts for considerable time to come. Many pre-*Miranda* trials will no doubt have been disposed of in the state courts by the time this case is heard. Nevertheless, there

is increasing resort to state post-conviction relief procedures by convicted defendants, together with ever increasing use of habeas corpus proceedings in the federal courts, particularly as those avenues once barred to the indigent are now freely opened. Thus, the state and federal courts will need guidance for this difficult problem arising in pre-*Miranda* trials for many years to come.

(c) Post-*Miranda* Trials.

The problem here posed is alluded to by the court at page 477 of *Miranda v. Arizona, supra:*

> "* * * In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement."

It is too early for lower court clarification of that particular idea of *Miranda.* Speaking only from the personal experience of a practicing attorney, petitioner can assert that the above dictum has thrown confusion into the trial courts.

This case presents an opportunity for this Court to decide the issue upon a full and complete set of facts presented to it, rather than by abstract reasoning. In

none of the four cases decided under the heading of the *Miranda* case were impeachment facts presented so that the Court might fully and realistically examine all the implications and perform the necessary balancing of interests requisite to the propounding of such an important principle. The need for clarification on concrete facts is heightened by the above-quoted *Miranda* dictum, and this case is an appropriate one for such clarification.

3. The Decision Below Is Incorrect.

The Oregon court elevated the exclusionary rule to an absolute without realistic regard to the purposes to be served by such exclusion. It read the Fifth, Sixth, and Fourteenth Amendments, together with *Escobedo* and *Miranda*, as requiring prophylactic exclusion in every case for every purpose.

We join the three dissenting justices in disagreement. The commands of this Court in *Escobedo* and *Miranda* should be as flexible as the variety of circumstances to which they apply. This case shows the folly of such absolute application. The decision is based squarely on prophylaxis, yet no prophylactic purpose whatsoever is served by barring the limited use of limited portions of a completely voluntary, uncoerced statement taken in 1957 in compliance with all the protections required by this Court prior to June of 1966. *Cf. Johnson v. New Jersey*, 384 US 719 (1966).

The exclusionary rule is properly applied to cases of police abuse. *Cf. Mapp v. Ohio*, 367 US 643 (1961); *Escobedo v. Illinois, supra.* There was no such abuse here.

The exclusionary rule is properly applied to involuntary statements, for they are unreliable. See *Brown v. Mississippi*, 297 US 278 (1936); *State v. Smith, supra.* This statement was voluntary in the sense that it was not the product of police coercion or abuse.

Beyond, the exclusionary rule should be applied flexibly and appropriately to the interests to be weighed in each type of case.

The dissent of Holman, J., points out accurately that prophylaxis is sufficiently served by the inability of the state to profit from such matter in its case in chief. Police question for confessions, not for rebuttal. The extension of the rule to highly limited impeachment—resulting from perfectly proper 1957 questioning—is to make the exclusionary rule a license to perjure with impunity. This Court has never held that to be the purpose of the rule.

Surely, at the heart of our position is the rankling frustration of any trial lawyer of facing perjury—the ultimate disrespect for the judicial process—unable to use the reliable evidence in his hands to even partially impeach. Prophylaxis is an unsatisfactory explanation when the police obtained the evidence in complete re-

spect for the statutory and constitutional safeguards in effect in 1957, but changed seven years later.

We therefore urge upon this Court, as we did upon the Oregon court, adoption of the formulation of the District of Columbia and Second Circuits as announced in *Tate v. United States, supra.* That rule allows a defendant to deny the elements of the crime, but if he goes beyond it also allows impeachment on collateral matters by the use of voluntarily made, i.e., trustworthy statements. Under this rule, no new evidence of crime is brought before the jury, but defendant's credibility as a witness, like any other witness, is subject to proof of prior inconsistent statements as to collateral matters. The rule is a middle road serving both prophylaxis and truth. Applying such a standard, this case should be reversed and the conviction should stand.

CONCLUSION

For the reasons discussed above, petitioner submits that a writ of certiorari should issue to review the decision of the court below.

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APPENDIX A

OPINION OF THE COURT BELOW

IN THE SUPREME COURT OF THE
STATE OF OREGON

In Banc

State of Oregon,
Respondent,

v.

Frank Leroy Brewton,
Appellant.

GOODWIN, J.

This is an appeal from a conviction of first-degree murder. Background facts beyond those essential for this appeal are substantially outlined in State v. Brewton, 220 Or 266, 344 P2d 744 (1959), and in 238 Or 590, 395 P2d 874 (1964).

The only issue here is whether it was error to permit the state to impeach the defendant with statements that were elicited from him by police interrogation which, the state concedes, rendered the statements inadmissible as a part of its case in chief. The interrogation, which took place in November 1957, was not preceded by the warnings and advice concerning Fifth and Sixth Amendment protection that are now required by State v. Neely, 239 Or 487, 503-504, 395 P2d 557, 398 P2d 482, 486-487 (1965), and by subsequent decisions of this court.

After the state had rested without offering Brewton's admissions in evidence, Brewton took the stand in his own defense. He told a story which, if believed, might have been consistent with his theory that he was not a principal in the crime. Brewton's courtroom story, however, was wholly inconsistent with the statements he had given the police shortly after his arrest.

After hearing the defendant's testimony, the state offered his police-station admissions for the limited purposes of impeachment, and they were so received over a timely objection. (The trial court earlier had held a hearing upon the issue of voluntariness, and had found as a fact that the admissions which Brewton made to the police were voluntary, at least in the sense that they were not coerced in any manner. The statements fell under the exclusionary rule only because they did not meet the constitutional requirements of *State v. Neely*.)

A number of state and federal decisions tend to support the trial court in receiving such evidence for impeachment. Tate v. United States, 283 F2d 377 (DC Cir 1960), deals with the conflict between the *McNabb-Mallory* exclusionary rule and a desire for truth provable by trustworthy evidence. The case holds that when one set of these interests must yield it is better that the exclusionary rule yield than to stand upon that rule and invite perjury. See also State v. McClung, 66 Wash2d 654, 404 P2d 460 (1965), cert. denied, 384 US 1013, 86 S Ct 1967, 16 L Ed 2d 1031 (1966). It might be noted that the federal procedural rationale for the *McNabb-Mallory* rule has recently been replaced by constitutional rules now binding on the states. Escobedo v. Illinois, 378 US 478, 84 S Ct 1758, 12 L Ed 2d 977 (1964).

This court has not been faced with the identical question decided in Tate v. United States, but State v. Smith, 242 Or 223, 408 P2d 942 (1965), is instructive. In *State v. Smith*, we held that a confession not shown to be voluntary was just as untrustworthy when used to prove the defendant a liar as when used to prove that he committed the crime for which he was on trial. It has been pointed out in the case at bar that Brewton's admissions to the police were voluntary, at least in the pre-*Escobedo* sense that they were not obtained by threats or promises.

While an argument can be made that "voluntary" unconstitutional confessions can be distinguished from

"involuntary" unconstitutional confessions, solely for the purposes of impeachment, this dichotomy does not appeal to us as constitutionally meaningful.

Since the decision in State v. Neely, supra, this court has consistently applied the exclusionary rule when the facts established interrogation which was held to violate the constitutional rights of the defendant as interpreted in *State v. Neely*. See, e.g., State v. Ervin, 241 Or 475, 406 P2d 901 (1965); State v. Keller, 240 Or 442, 402 P2d 521 (1965). In these cases we have recognized the inherently coercive character of police interrogation of a suspect in custody who has not been advised of his rights. Even in cases in which we have affirmed convictions following custodial interrogation, we have done so only upon express findings supported by credible evidence that there was an intelligent waiver of rights. See, e.g., State v. Atherton, 242 Or 621, 410 P2d 208, cert. denied 384 US 1025, ___ S Ct ___, 16 L Ed 2d 1030 (1966).

Whether or not Miranda v. Arizona, 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694, 714 (1966) is binding upon Oregon courts with reference to trials concluded before the *Miranda* decision was published, we are satisfied that any attempt in the future to restrict the exclusionary rule to the state's case in chief would be inconsistent with the constitutional principles which are inherent in the *Miranda* case as well as in our own earlier decision in *Neely*.

The United States Supreme Court under the Fourteenth Amendment has attempted to achieve uniformity between the state and federal systems in the interpretation of Fourth, Fifth, and Sixth Amendment rights. It has done so upon the assumption that the exclusionary rule is a necessary procedural device to implement the substantive rights written into the Fourth, Fifth, and Sixth Amendments: This court, accordingly, has adopted the assumption that without the procedural aid of the exclusionary rule those substantive rights would be empty promises instead of constitutional guarantees. We

so held in *State v. Neely*, and we have followed that view in cases coming before us since *Neely*.

If we should today adopt a restrictive application of the exclusionary rule, the result could be a major step backward. This court would in effect be saying to the overzealous that police officers will be free in the future to interrogate suspects secretly, at arms length, without counsel, and without advice, so long as they use means consistent with threat-or-promise voluntariness, and so long as they understand that they may file the information only for use to keep the defendant honest. Thus the police could, at their option, take a calculated risk: By giving up the possibility of using the suspect's statements in the state's case, they could obtain by unconstitutional means and store away evidence to use if the defendant should elect upon trial to take the stand. As commendable as it may be to prevent perjury, the price of such prevention could be to keep defendants off the stand entirely. In some cases, the temptation to silence a suspect of dubious probity might very well outweigh the desire to conduct a constitutionally valid interrogation. We have concluded that to introduce such a rule could undo much of the recent progress that has been made in upgrading police methods to preserve the rights guaranteed under the Fifth and Sixth Amendments, and would be inconsistent with the trend of our recent decisions.

We are also unable to follow the "middle ground" suggested in Tate v. United States, supra, to the effect that if a defendant merely takes the stand and denies his part in the crime he may not be impeached by the fruits of unconstitutional interrogation, but if he testifies about collateral matters he may be so impeached. Such a rule would be virtually unworkable. The usual reason a defendant chooses to take the stand is to give the jury a comprehensive statement of his side of the story. Any story that would be responsive to the questions raised by the state's case would tend to open up collateral matters and would invite impeachment if the tools of im-

peachment were at hand. The state should be free to impeach, but it ought to come by its impeachment as legally as it accumulates its other evidence.

If the choice is to exclude all illegally obtained evidence or to silence the defendant as a witness, it is better to exclude the illegal evidence. As we have said before, circumvention of constitutional liberties is not to be encouraged by permitting illegally obtained evidence to come in "through the back door." State of Oregon v. Goodwin, 207 Or 642, 645, 298 P2d 1024 (1956).

Other assignments of error have been briefed and argued, but since they present questions that are not likely to arise upon another trial they need not be discussed at this time.

The case is reversed and remanded to the trial court for a new trial.

Dissenting Opinion by Perry, J.

PERRY, J., dissenting.

I am of the opinion that neither Miranda v. Arizona, 384 US 436, 86 S Ct 1602, 16 L ed 2d 694, nor any of the opinions of this court, compel the reasoning or result approved by the majority in this case.

Miranda v. Arizona, supra, and State v. Neely, 239 Or 487, 395 P2d 557, 398 P2d 482, deal with the use of confessions for the purpose of providing probative facts required to establish the necessary elements of the crime with which a defendant is charged. These cases are thus grounded upon the proposition set forth in the Fifth Amendment of the Constitution of the United States — that no man shall be compelled to give incriminating evidence against himself.

Incriminating evidence is evidence which tends to show that the defendant did certain acts from which a trier of fact could conclude that the defendant committed the crime charged. The purpose of the prophylactic rule of exclusion then is to prevent the introduction of statements made by a defendant which tend to establish his guilty acts as matters of fact.

The introduction of statements made by a defendant by way of impeachment to test the credibility of his story of his innocence serves no such purpose.

A defendant's statements and his confession thus used have no probative value to prove the crime charged, and the trial court will so instruct the jury.

The trial judge, after an extensive hearing, held that the confession of this defendant was voluntary, but that it could not be used as probative evidence because it violated the absolutism rules of procedure laid down by a majority of the Supreme Court of the United States to curb what they believed were unwarranted police practices.

State v. Smith, 242 Or 223, 408 P2d 942, permits the introduction of statements for impeachment purposes if found voluntary.

In Walder v. United States, 347 US 62, 65, 74 S Ct 354, 98 L ed 503 (1954), in dealing with an exclusionary rule that prevented the introduction of evidence as proof of the crime charged, the Supreme Court stated:

> "It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. * * *"

I know of no reason why this court should go beyond the requirements of the Supreme Court of the United States in announcing a rule that would enlarge the exclusionary rules of the Supreme Court to a point not compatible with the purposes sought to be served by the Fifth Amendment.

Based upon the rationale of Walder v. US, supra, followed in Tate v. US, 283 F2d 377 (DC Cir 1960), and State v. McClung, 66 Wash2d 654, 404 P2d 460 (1965), I would affirm the judgment.

Dissenting Opinion by Holman, J.

HOLMAN, J., dissenting.

The issue is whether the prophylactic purposes of *Escobedo*[1] and *Neely*[2] will be negated if admissions and confessions obtained by non-compliance with those cases are permitted to be used for impeachment of defendants. I am of the opinion that the inability of the prosecution to use such admissions and confessions in its case in chief for incriminating purposes will be sufficient to obtain compliance with *Escobedo* and *Neely* requirements by the police. If this is so there is no valid reason for not permitting the use for impeachment purposes of evidence that everyone concedes is both relevant and truthful.

O'Connell, J., joins in this dissent.

1. Escobedo v. State of Illinois, 378 US 478, 84 S Ct 1758, 12 L ed2d 977 (1964).
2. State v. Neely, 239 Or 487, 395 P2d 557, 398 P2d 482 (1965).

APPENDIX B

IN THE CIRCUIT COURT OF THE
STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

THE STATE OF OREGON, Plaintiff,	)	No. C-35902
	)	FINDINGS OF FACTS
	)	AND
vs.	)	CONCLUSIONS OF LAW
FRANK LeROY BREWTON, Defendant.	)	AND
	)	ORDER

The court having previously heard testimony by state and defendant concerning the voluntariness of confessions purportedly made by defendant and admitted into evidence upon the trial of the above-entitled cause and arguments the court hereby finds:

FINDINGS OF FACTS

1. The statements made by Frank LeRoy Brewton, defendant herein, to Raymond Duerst and Fred Thompson in the Portland Police Station at Second and Oak Streets, Portland, Oregon, on the 15th day of November, 1957, and also the statements made by the defendant herein to Michael O'Leary and Sgt. Tennant on the 17th day of November, 1957 at the Portland Police Station at Second and Oak Streets, Portland, Oregon, and also the statements made by the defendant herein to Einar Moen and Philip Jackson on the 17th day of November, 1957, at the Portland Police Station at Second and Oak Streets, Portland, Oregon, were all voluntary-in-fact, that is, there was no force, intimidation, promises, duress, offers of reward or leniency, or any other fact made or used by the police to wrongfully induce the aforementioned statements.

2. The statements made by the defendant herein to Raymond Duerst, Fred Thompson, Michael O'Leary and Sgt. Tennant were made without either of the police having first advised the defendant of his right to remain

silent or of his right to then and there have assistance of counsel.

3. The statements made by the defendant herein to Einar Moen and Philip Jackson were made after the defendant had been advised of his right to remain silent but prior to any advice by anyone that he, the defendant, had a right then and there to assistance of counsel.

4. All the aforementional statements of the defendant herein were made at a time when he was a prime suspect for the crime for which he was later indicted and at a time when police investigation had focused on him.

5. The defendant herein, after conviction, appealed to the Oregon Supreme Court where his conviction was affirmed. Thereafter, the Federal District Court for the District of Oregon ordered the Oregon Supreme Court to either withdraw its mandate of affirmance and appoint defendant an attorney on appeal or discharge the defendant from custody. Thereafter, the Oregon Supreme Court withdrew its mandate of affirmance, granted the defendant on appeal de novo and appointed counsel on appeal. Thereafter, the Oregon Supreme Court remanded to this court to determine whether defendant's confession were voluntary.

CONCLUSIONS OF LAW

1. The status of the defendant's case is that of a current appeal.

2. The case of *State v. Neely* is applicable to this case because the defendant herein is engaged in a current appeal.

3. None of the aforementioned statements of the defendant herein were legally voluntary, that is, none of the statements made by the defendant were made with full knowledge of his right to remain silent and of his right to assistance of counsel.

ORDERED that the State of Oregon have 60 days

from the date of this order to either try the defendant on the indictment against him or release him from custody; and it is further

ORDERED that said defendant be held without bail.

Dated this 8th day of March, 1965.

HERBERT M. SCHWAB,
Judge